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Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Marriage of:) 1 CA-CV 11-0488
)
MICHAEL SAMMON,) DEPARTMENT C
)
)
Petitioner/Appellee,) **MEMORANDUM DECISION**
)
v.) (Not for Publication -
) Rule 28, Arizona Rules of
DEBORAH H. SAMMON,) Civil Appellate Procedure)
)
Respondent/Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. FC 2010-050661

The Honorable Douglas Gerlach

REVERSED AND REMANDED IN PART; AFFIRMED IN PART

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D O W N I E, Judge

¶1 Deborah Sammon ("Wife") appeals from the decree dissolving her marriage to Michael Sammon ("Husband"). We reverse as to the family court's treatment of Husband's pension, and we remand the issue of spousal maintenance for reconsideration. We affirm the decree in all other respects.

FACTS AND PROCEDURAL HISTORY

¶2 The parties married in 1992 in New York, where Husband had been employed with the New York Police Department ("NYPD") since 1986. Husband was injured on the job and began receiving "accident disability pension" payments in 2005, spurred by job injuries sustained in 2004. The parties later moved to Arizona and separated in May 2009.

¶3 After a trial, the family court entered a dissolution decree, ordering, *inter alia*: (1) there was no community interest in Husband's pension; (2) Husband was to pay spousal maintenance of \$2,150 a month for five years; (3) Husband was to pay child support effective April 1, 2010; (4) Wife was to pay Husband \$2,000 from her 2009 tax refund; (5) Wife failed to prove her claims of waste; and (6) Wife was not entitled to an award of attorneys' fees. Wife filed a timely notice of appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1).

DISCUSSION

I. Pension

¶4 Wife contends the family court erred in characterizing Husband's pension as his sole and separate property. "We review the family court's characterization of property *de novo*." *Davies v. Beres*, 224 Ariz. 560, 562-63, ¶ 6, 233 P.3d 1139, 1141-42 (App. 2010) (citations omitted). Whether property is community or separate is governed by the law of the marital domicile at the time the property was acquired. *See Nationwide Res. Corp. v. Massabni*, 143 Ariz. 460, 463, 694 P.2d 290, 293 (App. 1984). As such, New York law governs the characterization of Husband's pension.

¶5 Prior to trial, Husband moved for partial summary judgment, arguing the pension was his separate property. The court denied Husband's motion on procedural grounds. At trial, the parties disagreed about whether there was any community component to the pension. The court allowed supplemental briefing on the issue. It later issued a minute entry ruling concluding that, pursuant to *Berardi v. Berardi*, 865 N.Y.S.2d 245 (N.Y. App. Div. 2008), accidental disability pensions are the separate property of the employee spouse. The court asked the parties to stipulate to the nature of Husband's pension, or, alternatively, to submit supplemental documentation. The

parties thereafter stipulated that Husband received "an accident disability retirement allowance" pursuant to Administrative Code of the City of New York section 13-252. The court subsequently denied Wife's claimed community interest in the pension.

¶16 *Berardi* recognized the general rule in New York that the portion of a pension constituting compensation for a disability is the injured spouse's separate property, whereas the portion constituting deferred compensation is community property. 865 N.Y.S.2d at 248 (citations omitted); see also *Majauskas v. Majauskas*, 463 N.E.2d 15, 19 (N.Y. 1984); *Mylett v. Mylett*, 558 N.Y.S.2d 160, 162 (N.Y. App. Div. 1990). *Berardi* noted that accident disability pensions are based on physical or mental incapacity and not length of service. 865 N.Y.S.2d at 248. The court stated that accident disability pensions are similar to disability pensions to the extent they are compensation for personal injuries. *Id.*

¶17 In *Berardi*, the parties had an original qualified domestic relations order ("QDRO") allocating the husband's future NYPD pension benefits. *Id.* at 247. The husband later qualified for an accident disability pension, and the wife sought to modify the QDRO to allocate a share of the increased pension benefits to her. *Id.* However, the parties had only stipulated that the wife was entitled to a percentage of the

ordinary disability benefits; the stipulation contained no provision regarding an accident disability pension. *Id.* at 248-49. Thus, the court held the original QDRO could not be modified to apportion accident disability benefits that were not part of the stipulation. *Id.* Significantly, it also deemed the record insufficient to determine "what portion, if any, of the [husband's] benefits constitute[d] marital property subject to equitable distribution rather than compensation for personal injuries." *Id.* at 249 (citations omitted). A hearing was necessary to determine "the nature and status of the [husband's] pension and the [wife's] allocable share thereof." *Id.*

¶18 *Berardi* recognized that a portion of an accident disability pension is compensation for personal injuries not subject to equitable distribution. It did not, however, hold that the *entire* pension constitutes compensation for personal injuries. New York courts have previously held that, "to the extent [accident disability] payments represent deferred compensation, they are indistinguishable from ordinary retirement pensions subject to equitable distribution." *Mylett*, 558 N.Y.S.2d at 162 (citation omitted). Husband argues *Mylett* predates *Berardi* and does not specify the type of pension involved. However, *Berardi* cites *Mylett* as support, 865 N.Y.S.2d at 249, and the spouse in *Mylett* was a NYPD officer who

suffered a "service-related disability"; the court referred to "accident disability payments[,]" 558 N.Y.S.2d at 161-62.

¶9 Our conclusion is also supported by a more recent case -- *Nugent-Schubert v. Schubert*, 931 N.Y.S.2d 642 (N.Y. App. Div. 2011). In *Schubert*, the parties stipulated to a QDRO giving the wife 50 percent of "any pension" the husband received. *Id.* at 643-44. The husband subsequently retired on an accident disability pension. Pursuant to the stipulation and QDRO, the wife received one-half of that pension. *Id.* at 644. The husband sought to modify the QDRO to exclude the portion of his accident disability pension representing compensation for personal injuries. *Id.* The court found the situation in *Berardi* analogous and held that a stipulation to equally divide "any pension" does not entitle the non-injured spouse to that portion of the pension representing compensation for personal injuries. *Id.* at 644-45. It thus recognized that accident disability pensions may constitute compensation for personal injury as well as deferred compensation. *Id.* at 645.

¶10 Husband's reliance on *Dolan v. Dolan*, 583 N.E.2d 908 (N.Y. 1991), is unpersuasive. Although *Dolan* states that there is no length of service requirement to *qualify* for an accident disability pension, it does not hold that accident disability

pensions lack any deferred compensation component as a matter of law. *Id.* at 910.

¶11 Further, according to the New York City Administrative Code, a portion of an accident disability pension consists of "[a]n annuity, which shall be the actuarial equivalent of [the employee's] accumulated deductions at the time of his or her retirement." N.Y. City Admin. Code § 13-258. The "accumulated deductions" are "the sum of all the amounts, deducted from the compensation of a member or contributed by him or her, standing to the credit of his or her individual account in the annuity savings fund together with regular interest and special interest, if any, thereon." *Id.* § 13-214(7). Under this definition, a portion of Husband's accident disability pension consists of deductions taken during the marriage, which are community in nature.

¶12 Additionally, the pension documents in evidence include detailed accounts of Husband's earning history and calculations regarding a three-year average annual salary. This evidence suggests the New York City Police Pension Fund, at least in part, based the amount of the pension on Husband's length of service. The fact that Husband would have been entitled to an accident disability pension on day one of his employment does not mean the entire benefit he now receives is

compensation for personal injuries. The amount of the benefit increased with the length of service. Therefore, a portion of the pension is subject to a community interest.

¶13 Wife contends Husband failed to prove the extent of his separate property rights, so the entire benefit should be deemed community property. See *Palazzolo v. Palazzolo*, 663 N.Y.S.2d 58, 60 (N.Y. App. Div. 1997) (under New York law, the spouse resisting an equitable division bears the burden of proving the extent of his separate property right). We disagree. At the outset of trial, Husband's counsel stated that the pension dispute was a question of law for the court to decide. He further stated that, should the court determine a community interest existed, Husband would stipulate to Wife's calculation of the amount of that interest. Based on the expert opinion Wife proffered, her community share of the pension benefit is \$1,249.80 a month. On remand, the family court shall modify the decree to award Wife that amount and shall determine the effective date of the benefit.

II. Spousal Maintenance

¶14 Our determination that Wife is entitled to a portion of Husband's pension will increase her monthly income and decrease Husband's. We therefore remand the issue of spousal maintenance for reconsideration. The court may reconsider the

amount, duration, and effective date of maintenance in light of the changes in the parties' financial circumstances.

III. Child Support

¶15 The family court ordered child support to begin April 1, 2010. Wife argues the order should have been retroactive to the date of separation -- May 2009. Whether an award must be retroactive is a question of law that we review *de novo*. *Simpson v. Simpson*, 224 Ariz. 224, 225, ¶ 4, 229 P.2d 236, 237 (App. 2010).

¶16 Pursuant to A.R.S. § 25-320(B), child support is typically retroactive to the filing of the dissolution petition. See *Simpson*, 224 Ariz. at 226, ¶ 9, 229 P.3d at 238. The petition in this case was filed February 22, 2010. However, the family court was authorized to consider any temporary, voluntary support Husband paid. See Ariz. Rev. Stat. ("A.R.S.") § 25-320(B). There was evidence that he voluntarily supported the children during the proceedings. Given the record before it, we cannot say the court erred in making child support effective April 1, 2010.¹

¹ Wife also contends the amount of child support was insufficient. Her argument, though, is not sufficiently developed on this point. "Arguments unsupported by any authority will not be considered on appeal." *Ness v. W. Sec. Life Ins. Co.*, 174 Ariz. 497, 503, 851 P.2d 122, 128 (App. 1992) (citation omitted).

IV. Waste

¶17 Wife argues the court erred by rejecting her claim that Husband wasted community assets. "The trial court is specifically authorized to consider excessive or abnormal expenditures and the concealment or fraudulent disposition of community property when apportioning community property." *Gutierrez v. Gutierrez*, 193 Ariz. 343, 346, ¶ 6, 972 P.2d 676, 679 (App. 1998). We will affirm the court's ruling if there is reasonable evidence to support it. *Id.* at ¶ 5. Where one spouse makes a prima facie showing of abnormal or excessive expenditures, the other spouse bears the burden of proving the expenditures were for a community purpose. *Id.* at 346-47, ¶ 7, 972 P.2d at 679-80.

¶18 Wife established that Husband withdrew \$35,000 from a community CD account and \$21,500 from a joint money market account. Wife recognizes that Husband paid \$22,386 toward the community mortgage with some of these funds. Thus, she sought \$17,057 as her share of the funds. Husband testified he used the funds for community bills and deposited some of the money into Wife's account and the parties' joint checking account.

¶19 Wife also argues the court failed to consider Husband's withdrawal of funds from two community retirement accounts. She asserts entitlement to \$17,200 as her share of

the withdrawn funds from these accounts. Husband testified he spent roughly \$10,000 from an unspecified retirement account to furnish his home in May 2009. The community furnishings remained with Wife in the marital residence. Husband also spent \$14,400 from a community retirement account on everyday expenses for the two households. From the final \$20,000 withdrawal, Husband used \$10,000 to help the parties' son buy a car and deposited \$10,000 into his own account to pay bills, including the children's soccer expenses and \$6,000 for mediation.

¶20 We defer to the family court's "determination of witnesses' credibility and the weight to give conflicting evidence." See *Gutierrez*, 193 Ariz. at 347, ¶ 13, 972 P.2d at 680. The court here ruled that Wife's waste claim "was not established by persuasive evidence." Based on the record before it, a reasonable trier of fact could conclude that Husband's expenditures were neither abnormal nor excessive.²

V. Tax Refund

¶21 The court awarded Husband a \$2,000 judgment for his share of the parties' 2009 tax refunds. Wife contends it was

² Wife also argues Husband spent \$800 for a gym membership for his girlfriend. Husband, however, testified that the cost of a family membership did not increase by adding the girlfriend.

inequitable to order her to share her refund with Husband and not to order him to share his.

¶122 We review the apportionment of property under an abuse of discretion standard. See *In re Marriage of Pownall*, 197 Ariz. 577, 581, ¶ 15, 5 P.3d 911, 915 (App. 2000). The record reveals that Wife's refund was \$8,035, and Husband received a \$1,500 refund. Husband denied that the parties had agreed to keep their respective refunds. Based on the evidence in the record, we find no abuse of discretion in allocating the tax refunds.

VI. Attorneys' Fees & Costs

¶123 Wife argues the family court abused its discretion in denying her request for an award of attorneys' fees and costs. She contends Husband took unreasonable positions and failed to disclose pension information. She also argues Husband had greater financial resources.

¶124 Husband claimed to have provided all financial documents in a timely manner. The family court concluded neither party had taken unreasonable positions -- a determination that the record supports. And although the financial disparity rendered Wife eligible for a fee award, the decision to award fees remained discretionary. See *Magee v. Magee*, 206 Ariz. 589, 593, ¶ 18, 18 P.3d 1048, 1052 (App. 2004).

The record reflects that although Wife earned less than Husband, both spouses used community funds to pay legal fees. On this record, we cannot say the family court abused its considerable discretion in denying Wife's fee request.

¶25 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. §§ 25-324 and 12-349. Wife also requests fees pursuant to § 12-350. In the exercise of our discretion, we decline to award appellate fees to either party. Moreover, each party prevailed to some extent on appeal, resulting in no clearly successful party for purposes of a cost award.

CONCLUSION

¶26 We reverse the determination that Husband's pension benefits are his sole and separate property. We remand for a modified decree as to pension benefits. We also remand the issue of spousal maintenance for reconsideration for the reasons stated. The remainder of the decree of dissolution is affirmed.

_____/s/_____
MARGARET H. DOWNIE, Judge

CONCURRING:

_____/s/_____
MICHAEL J. BROWN, Presiding Judge

_____/s/_____
ANDREW W. GOULD, Judge